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This is the author's version of a work that was submitted/accepted for publication in the following source:

[Carroll, Emma & Coates, Jessica](#)
(2011)

The School Girl, the Billboard, and Virgin: The Virgin Mobile Case and the Use of Creative Commons Licensed Photographs by Commercial Entities. In Fitzgerald, Brian & Perry, Mark (Eds.) *Knowledge Policy for the Twenty-First Century : A Legal Perspective*.
Irwin Law, Ontario.

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<http://www.irwinlaw.com/titles/knowledge-policy-twenty-first-century>

THE SCHOOL GIRL, THE VIRGIN AND THE BILLBOARD: AN EXAMINATION OF THE VIRGIN MOBILE CASE AND ITS IMPLICATIONS FOR THE USE OF CREATIVE COMMONS LICENSED PHOTOGRAPHS BY COMMERCIAL ENTITIES

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I. INTRODUCTION

It's Friday afternoon. That one drink at lunch turned into more than a couple, resulting in an emergency nap under your desk back at the office. The boss need never know... But unfortunately it's 2007, the digital age. Someone in the office that day had a camera, and unbeknownst to you that photograph of you snoring under the computer was posted on the internet. All in good fun, right? But what if the photographer who decided to post the embarrassing photograph online did so under a Creative Commons licence that allows commercial reuse, and the image is plucked off the Internet for use in a nationwide advertising campaign?

This is exactly what happened in June 2007 when billboards were put up across Australia displaying Creative Commons licensed photographs from the Yahoo! Flickr¹ website as part of an advertising campaign for Australian-based corporation, Virgin Mobile.² The result saw a law suit brought against the international corporation, by both the photographer of one of the photos used in the campaign and the Texan school girl it

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¹ online: Flickr <<http://www.flickr.com>>.

² See Jude Townend, "Virgin Backs Down on Ads" *The Australian* (25 July 2007), online: The Australian <<http://www.theaustralian.news.com.au/story/0,25197,22130223-7582,00.html>> [Townend]; Asher Moses, "Virgin Sued for Using Teen's Photo" *The Sydney Morning Herald* (21 September 2007), online: The Sydney Morning Herald <<http://www.smh.com.au/news/technology/virgin-sued-for-using-teens-photo/2007/09/21/1189881735928.html>> [Moses]; David Koenig, "Family Sues Phone Company Over Ad" *San Francisco Chronicle* (20 September 2007), online: SFGate <<http://www.sfgate.com/cgi-bin/article.cgi?file=/n/a/2007/09/20/national/a170859D28.DTL&type=printable>>; Noam Cohen, "Use My Photo? Not Without My Permission" *The New York Times* (1 October 2007), online: The New York Times <http://www.nytimes.com/2007/10/01/technology/01link.html?_r=1&ex=1348977600&en=8b50f28a0b83340b&ei=5088&partner=rssnyt&emc=rss&oref=slogin> [Cohen].

featured.³

Drawing on other examples of the use of Creative Commons licensed Flickr photos by corporate entities, this paper looks at the effects of Virgin Mobile's conduct for Creative Commons and the Creative Commons community. It will consider not only the issue of whether Virgin Mobile has complied with the Creative Commons copyright licence, but also what the incident can tell us about additional legal issues not contemplated by the Creative Commons licences, such as privacy rights, model clearances and defamation. Finally, it will consider the ethical issues that arise from corporate use of Creative Commons-licensed content, and the ramifications of this case for the Creative Commons community in general.

II. FLICKR, CREATIVE COMMONS AND BIG BUSINESS

The Yahoo!-owned Flickr website has proven itself a popular choice for online photo management.⁴ Its user-friendly application enables photos to be catalogued and shared either selectively or to the public, at the photographer's discretion. To increase the flexibility of its copyright management tools, the service provides the option for users to license their photographs under the Creative Commons licensing scheme, which lets creators give permission in advance for uses such as commercial dealings and remixing, which would not ordinarily be permitted under standard copyright law.⁵

The inclusion of Creative Commons as an option on Flickr has led to a vast increase in Creative Commons-licensed photos. There are over 65 million Creative Commons licensed photos listed on Flickr as of April 2008,⁶ making Flickr the single biggest repository of photographs available for re-use under open content licences. To assist navigation of this vast collection, the Flickr site includes a page dedicated to hosting Creative Commons-licensed photos,⁷ grouped according to licence type. This makes it simple for those searching for an image to use, for example, in a publication, website or advertising campaign, to find a photograph suited to their purpose.

However, the increased profile and usage in the photographer community that Flickr's incorporation of Creative Commons has engendered has not come without controversy. Debates about the use of Creative Commons licences and material are common within

³ *Chang v. Virgin Mobile USA LLC* (19 October 2007), Dallas 3:2007cv01767 (Tex. Dist. Ct.), . online: Justia.com <http://dockets.justia.com/docket/court-txndce/case_no-3:2007cv01767/case_id-171558/> [Chang].

⁴ Yahoo purchased Canadian company Flickr in 2005.

⁵ See "Creative Commons", online: Flickr <<http://www.flickr.com/creativecommons/>>.

⁶ As of 19 April 2008, there were 65,670,475 Creative Commons licensed photos on Flickr. Flickr reached 2 billion images in November 2007. See Michael Arrington, "2 Billion Photos on Flickr" (13 November 2007), online: TechCrunch <<http://www.techcrunch.com/2007/11/13/2-billion-photos-on-flickr/>>.

⁷ *Supra* note 5.

the Flickr discussion boards.⁸ Because of the nature of photography and the manner in which third parties use images, the growth of Creative Commons licensed content on Flickr has had a strong effect on the pro-am photographer community, and particularly the market for stock-photographs which has traditionally been the main and often only source of income for many photographers. Where previously stock-photograph companies such as Getty Images were the primary source of generic photographs, companies motivated by cost and convenience are increasingly using Creative Commons-licensed photographs available for free from Flickr. This has led many photographers to be highly vocal in their opposition to Creative Commons-licensing and the use of Creative Commons-licensed photographs by third parties. To quote Scott Baradell from the prominent Black Star Rising photography blogzine:

Before Creative Commons, a corporation or ad agency that wanted to use your photo would have to contact you or your photo agency for permission to use it. You could negotiate a price based on the particular use, making sure you got a fair deal. Through Creative Commons, hundreds of thousands -- if not millions -- of photographers have thrown away this right forever. ...the end result is that you are building a system enabling commercial buyers to use your images without paying for them.⁹

A The Story So Far

With all this controversy, combined with the complexity of copyright law and the casual attitude many people have to using material available online, it is hardly surprising that the Virgin Mobile case is not the only time over the past few years that the use of Creative Commons-licensed images sourced from Flickr by commercial entities has led to public debate and even legal action. Before turning to analysis of the circumstances of the Virgin Mobile case, we will first consider two of the more prominent incidents of commercial usage of Creative Commons-licensed Flickr photographs below.

B Curry v Audax

The first court decision involving Creative Commons, *Curry v Audax*,¹⁰ concerned the commercial publication of Creative Commons licensed photographs downloaded from Flickr. In a typical celebrity versus the tabloids dispute, the claimant, former MTV music video jockey and reality television star Adam Curry, brought proceedings in the District

⁸ See e.g. Flickr discussion board, "Dump Your Pen Friend", *Flickr* (27 May 2007), online: Flickr <<http://www.flickr.com/photos/sesh00/515961023/>>.

⁹ Scott Baradell, "Why Photographers Hate Creative Commons" (20 December 2007), online: Black Star Rising 'Before Creative Commons, a corporation or ad agency that wanted to use your photo would have to contact you or your photo agency for permission to use it. You could negotiate a price based on the particular use, making sure you got a fair deal. Through Creative Commons, hundreds of thousands -- if not millions -- of photographers have thrown away this right forever. ...the end result is that you are building a system enabling commercial buyers to use your images without paying for them.' Available at <<http://rising.blackstar.com/why-photographers-hate-creative-commons-2.html>>.

¹⁰ *Curry v. Audax*, (9 March, 2006), Amsterdam 334492 / KG 06-176 SR (District Court of Amsterdam) ; English translation, online: <http://mirrors.creativecommons.org/judgements/Curry-Audax-English.pdf> [*Curry*]; published under Creative Commons-BY-2.5 licence by Lennert Steijger and Nynke Hendriks of the Institute for Information Law of the University of Amsterdam.

Court of Amsterdam in 2006 against Audax, publishers of the weekly tabloid magazine 'Weekend'. Curry had uploaded photographs of his family onto Flickr under a Creative Commons Attribution-Noncommercial-Sharealike (BY-NC-SA) licence, which allows use of the photographs for non-commercial purposes, where the author is attributed and where any derivative works (i.e. new works that make use of or draw from the original photograph) are also licensed under the BY-NC-SA licence. Curry alleged that Audax had infringed both the terms of the 'some rights reserved' licence and his right to privacy when they published four of the photographs in a magazine feature about his children.¹¹

The case focused on the issue of the validity and clarity of the Creative Commons licensing. Instead of trying to argue that the publication of the photographs in 'Weekend' (clearly a commercial use) was permitted by the licence, Audax instead claimed that the Creative Commons licence link was not obvious and they were misled by the notice on Flickr stating 'these photos are public'. They argued that they had published the photographs in good faith and had not committed any copyright breach. With regards to the right to privacy, Audax claimed that Curry had courted publicity for years, broadcasting details of his family's private life through his weekly reality TV show and frequent podcast and weblog disclosures, and that because the photographs were freely available for public viewing via his Flickr account, the celebrity had not suffered any damage or privacy breach through their publication.

Rejecting Audax's defence, the Court held that the Creative Commons licence under which the photographs had been made available was valid and that the prominent link to the licence included on the Flickr page provided sufficient notice as to its terms. Once this decision had been made, Audax's publication of the photographs in a commercial magazine was clearly in breach of the licence. Audax were also chastised for not taking the care that a professional media organisation in their position should have when publishing internet sourced material. If they had done so, the court argued, they would have investigated the link to the 'some rights reserved' licence and been made aware of the licence terms. While accepting that Audax were misled by Flickr's 'public' notice (a standard feature on all Flickr photographs that are marked for public viewing), the Court advised Audax that in case of any doubt they should have sought permission from Curry to use the photographs. They awarded Curry damages of €1000 (denoting the limited commercial value of the images because of their presence on Flickr) and issued an injunction against Audax prohibiting them from using content placed on Flickr by Curry without prior permission, unless done so in accordance with the Creative Commons licence conditions.

This case was important in addressing the practical implications of publishing under a Creative Commons licence and confirming that the licences have full legal standing, at least in the Netherlands. It clarified the misconception held by Audax and many others that content published on the Internet falls automatically into the public domain and provided legal authority that the limitations in Creative Commons-licensed content must be adhered to.

¹¹ *Ibid.*

C *El País*

More recently, a similar incident occurred in Colombia. In December 2007, photographer Maria Claudia Montano discovered that an image she had uploaded onto her Flickr page under a Creative Commons Attribution-Noncommercial-No Derivatives licence (which allows non-commercial use as long as the photograph is not altered in any way and the photographer is attributed) had been used by regional newspaper *El País* to advertise a photographic exhibition in their weekly magazine.¹² As with the *Curry* case, the magazine's use was clearly in breach of the terms of the Creative Commons licence – not only had the photograph been used in a commercial publication, it had also been modified in breach of the No Derivatives term and the publication had failed to attribute Montano as owner of the image.

Upon making this discovery Montano promptly announced via her online weblog that *El País* had done this without her knowledge or permission. In response, *El País* announced publicly that the photograph had been used to advertise an exhibition of which Montano was a participant; a fact which Montano flatly denied.¹³ Even if this were the case, Montano argued, it did not have any effect on the licence terms and did not excuse the infringement. As with the *Curry* case, *El País* chose not to argue that its use was permitted by the licence, but rather to challenge the notification of the licensing terms and the validity of copyright in 'online' material. According to online sources, Montano's complaints to *El País* were responded to by newspaper spokespeople with the following: "Why did you upload the picture to a place where it can be easily downloadable [sic]? One can not tell from the site that the picture is not available for others to use"¹⁴ – a remarkable reaction coming from a professional media organisation which could be expected to have a solid understanding of the laws of copyright.

After Montano's case came to light a number of similar occasions were uncovered by the online community in which *El País* had used Creative Commons Non-commercial licensed Flickr photographs without authority.¹⁵ Although at the time of writing no legal action had commenced against *El País*, the incident is receiving online media¹⁶ and web 2.0 community¹⁷ attention, and a number of photographers, including Montano, who have had their rights infringed are contemplating bringing suit. Considering the case is factually similar to *Curry v Audax*¹⁸, in the event of the matter going to Court, it appears likely that a similar outcome would result.

¹² Juliana Rincón Parra, "Colombia: Bloggers Fight for Creative Commons Rights" (10 December 2007), online: Global Voices Online <<http://www.globalvoicesonline.org/2007/12/10/colombia-bloggers-fight-for-creative-commons-rights/>>.

¹³ María Elvira Domínguez Lloreda, "Carta de El País a María Claudia Montano", *El País* (2007), online: El País <<http://www.elpais.com.co/paisonline/notas/Diciembre072007/mariaclaudiamontano.html>>.

¹⁴ Caro Botero, "Using Flickr Photos in the Traditional Media" (16 December 2007), online: iCommons.org <<http://icommons.org/articles/using-flickr-photos-in-the-traditional-media>>.

¹⁵ *Supra* note 12.

¹⁶ *Ibid.*

¹⁷ See, eg Flickr Discussion Board: avlxyz, "Scrambled Eggs with Smoked Salmon – Babka" (11 September 2006), online: <<http://www.flickr.com/photos/avlxyz/240472820/>>.

¹⁸ *Curry*, *supra* note 10.

III. THE VIRGIN MOBILE CASE

What unites the cases discussed above is that, setting aside spurious arguments as to the ethics of claiming copyright in publicly available photographs, the facts and legal ramifications are fairly straightforward. The images in question were licensed under Creative Commons licences that prohibited commercial use. Thus their use in profit-based media without attribution was a clear violation of the licence terms and of the copyright in the images.

The Virgin Mobile case is interesting precisely because it is not nearly so clear cut. In contrast to *Audax* and *El País*, not only does Virgin Mobile appear to have been aware of the Creative Commons licences that applied to the photographs they chose to use, they also appear to have made at least a good faith attempt to respect their terms. The case therefore raises far more complex questions about the precise legal and ethical issues surrounding use of Creative Commons material by corporate entities.

A The Facts

In May 2007¹⁹ Virgin Mobile launched its ‘Are you with us or what?’ advertising campaign.²⁰ The campaign saw billboards²¹ put up across Australia displaying amateur photographs, which had been branded with ‘comical’ captions in what Virgin mobile stated was “part of an approach designed to reject clichéd advertising in favour of more genuine and spontaneous shots”.²² On each of the billboards was the address of a website on which more similar advertisements were available, and which linked through to Virgin Mobile's main website. With the possible exception of one photograph,²³ all the photographs used in the campaign had been sourced from Flickr and were available under the Creative Commons Attribution licence, which not only allows commercial use but also allows modification of the photographs through cropping and the addition of

¹⁹ Although the exact date the campaign was first launched is unknown, it is mentioned in online news postings from early June 2007. See Duncan, “Virgin Mobile Cheap Text Ads From Flickr” (2 June 2007), online: Duncan’s Print <<http://www.print.duncans.tv/2007/virgin-mobile-cheap-texts>>; a The campaign is first referenced on Flickr on 28 June 2007. See “Virgin Mobile advertising campaign using Flickr photos” (28 June 2007) online: Flickr <<http://www.flickr.com/groups/central/discuss/72157600541608353>>; A photograph was labelled as being taken on 27 May 2007. See “Dump Your Pen Friend” (27 May 2007), online: Flickr <<http://www.flickr.com/photos/sesh00/515961023/>>.

²⁰ online: Virgin Mobile <<http://www.areyouwithusorwhat.com>>; accessed at 28 June 2007. Note that the website has since been disabled.

²¹ For images of the billboards, see “Virgin Mobile – Are you with us or what?” online: Flickr <<http://www.flickr.com/groups/379879@N24/pool/>>.

²² See “Virgin Mobile – “Are you with us or what?”” (16 July 2007), online: Flickr <<http://www.flickr.com/groups/379879@N24/discuss/72157600858275458>>.

²³ See babasu, “Scary Andrew” (5 November 2006), online: Flickr <<http://www.flickr.com/photos/babasu/289444685/>>, which is currently listed as being under a Creative Commons Attribution-Noncommercial-ShareAlike licence. See online: Creative Commons <<http://creativecommons.org/licenses/by-nc-sa/2.0/deed.en>>. Considering the fact that all other photographs used in the campaign were under an Attribution only licence, it seems likely to have been re-licensed under a more restrictive licence following Virgin’s usage.

captions. The only significant restriction imposed by this licence is that the original author must be attributed. Virgin Mobile included a link to the Flickr profile of the photographer in fine print at the bottom of each advertisement, presumably to comply with this term.

At least some of the Flickr photographers featured were “excited”²⁴ to see their photos used as the face of Virgin Mobile. In response to being told of a billboard featuring his photograph of his hand pushing an unmarked button captioned with “pressing buttons for the hell of it is a basic human right”,²⁵ Blake Emrys made the following comments:

Woohoo, that's my thumb! :) I can't really speak for everyone, but most of my photos are licensed as CC attribution, noncommercial, share alike. This was one of the few where I thought "Eh, what the heck - let 'em do whatever they want and let's see what happens!" so all I asked for was attribution. I'm glad I did.²⁶

Meanwhile, Qole Pejorian²⁷ (aka Alan Bruce) responded to negative comments by other users about his photograph being used with “I got a picture of mine used on billboards and magazines in Australia! Doesn't sound wrong to me.”²⁸ In a similar vein, Merfam (aka Jason Meredith) had this to say about the use of a photograph of his daughter in the campaign:

I can say that my photography has been used in a national ad campaign (magazine and billboard) by a Major Corporation. How many armature [sic] photographers can say that? I'm going to add this experience to my resume and consider it a feather in my cap. . .

I feel it was innovative of Virgin Mobile to use a Web 2.0 site like Flickr for their ad campaign. This is a company that understands the power of technology.²⁹

Merfam now lists the use of his photograph by Virgin Mobile as one his 'photo accomplishments' on his Flickr profile.³⁰ Congratulatory statements and positive comments were also made by other Flickr users, whose photographs had not been used in the campaign.³¹

²⁴ See Qole Pejorian [Alan Bruce]'s comment, “Virgin Mobile advertising campaign using Flickr photos” (28 June 2007), online: Flickr <<http://www.flickr.com/groups/central/discuss/72157600541608353/#comment72157600694703907>>.

²⁵ See josiejose, “CIMG0158.JPG” (27 May 2007), online: Flickr <<http://flickr.com/photos/awaketodream/517157852/>>.

²⁶ Blakeemrys [Blake Emrys]'s comment, “Dump Your Pen Friend” (27 May 2007), online: Flickr <<http://www.flickr.com/photos/sesh00/515961023/#comment72157600541633523/>>.

²⁷ See “Qole Pejorian's photostream”, online: Flickr <<http://www.flickr.com/photos/qole/>>.

²⁸ Qole Pejorian [Alan Bruce]'s comment, “Ruined Irish Church Graveyard” (24 July 2006), online: Flickr <<http://www.flickr.com/photos/qole/197513122/#comment72157600560006468>>.

²⁹ Merfam [Jason Meredith]'s comment, “Crazy” (26 November 2006), online: Flickr <<http://www.flickr.com/photos/merfam/307113221/comment72157601338373225/>>.

³⁰ Jason Meredith, “About merfam” (2007), online: Flickr <<http://www.flickr.com/people/merfam/>>.

³¹ See “Ruined Irish Church Graveyard” (24 July 2006), online: Flickr <<http://www.flickr.com/photos/qole/197513122/#comment72157602107221466>>; See also “Virgin

However some of the other photographers and subjects of these photographs did not find the ads quite so humorous.³² The campaign led to intensive online discussion, both on Flickr³³ and individual blogs³⁴ about the legal and ethical implications of corporate use of Creative Commons-licensed photographs, with the prevailing attitude being that Virgin Mobile had not acted entirely 'by the book'. It also gained considerable media attention, making the front page of news.com³⁵ and several prominent national and international broadsheets,³⁶ and was reported on the Australian Broadcasting Corporation's popular youth radio network, Triple J.³⁷ Most criticised was the fact that Virgin Mobile had made no attempt to inform the photographers that they were using their images in such a way, nor to obtain clearance from the people featured in the photographs.

B Dump Your Pen Friend

American high-school student Alison Chang was surprised to find herself the focus of one of the advertisements.³⁸ The advertisement, featuring Alison flashing the universal two fingered peace sign under the impudent caption "Dump your Pen Friend", was brought to her attention when a Flickr user saw it on a billboard in Adelaide, South Australia. They photographed the billboard and posted it to Flickr, congratulating the Flickr user 'Chewywong' for having his photograph used in the campaign.³⁹ 'Chewywong' was the username for Justin Wong, Alison's youth counsellor who had taken the picture at a fundraising car-wash and uploaded it to Flickr under a Creative Commons Attribution licence.

Alison's brother spoke out publicly both on the Flickr community boards and to a number of newspapers at the discomfort the family felt at Alison's image being used in the campaign.⁴⁰ They felt that the tagline was derogatory⁴¹ and that Alison's permission should have been asked before the photograph was used to promote Virgin's product.⁴² It

Mobile advertising campaign using Flickr photos" (28 June 2007), online: Flickr
<http://www.flickr.com/groups/central/discuss/72157600541608353/72157602105180125/>.

³² See online: icommons.org
[http://icommons.org/articles/%28http://www.flickr.com/groups/central/discuss/72157600541608353/#comment72157600669104564>.SITE NOT WORKING](http://icommons.org/articles/%28http://www.flickr.com/groups/central/discuss/72157600541608353/#comment72157600669104564>.SITE%20NOT%20WORKING)

³³ *Supra* note 8.

³⁴ Rogers Cadenhead, "Virgin Mobile Botches Creative Commons-Driven Ad Campaign" (11 July 2007), online: Workbench <www.cadenhead.org/workbench/news/3232/virgin-mobile-botches-creative>.

³⁵ See Townend, *supra* note 2.

³⁶ *Supra* note 2.

³⁷ See online: <http://www.abc.net.au/triplej/hack/notes/mp3s/hack_flickr.mp3>.

³⁸ Aleeviation [Alison Chang]'s comment, "Dump Your Pen Friend" (27 May 2007), online: Flickr
<http://www.flickr.com/photos/sesh00/515961023/#comment72157600541633523/>.

³⁹ *Supra* note 8.

⁴⁰ teacherjamesdotcom [Damon Chang]'s comment, "Virgin Mobile advertising campaign using Flickr photos" (28 June 2007) online: Flickr
<http://www.flickr.com/groups/central/discuss/72157600541608353/#comment72157600614863168>;
 See also Moses, *supra* note 2.

⁴¹ Moses, *supra* note 2.

⁴² teacherjamesdotcom [Damon Chang]'s comment "Virgin Mobile advertising campaign using Flickr photos" (28 June 2007) online: Flickr
<http://www.flickr.com/groups/central/discuss/72157600541608353/72157602096415462/>.

wasn't long before a suit was filed in the District Court of Dallas County, Texas, by the Changs and the photographer Wong.⁴³ Named as defendants in the initial suit were Virgin Mobile Pty Ltd (the Australian company), their American constituents Virgin Mobile USA, LLC and the Creative Commons Corporation.

The papers filed seek to bring suit on a number of bases. Alison's parents allege that Virgin Mobile's use of the photograph of their daughter constituted a violation of her privacy and that the insulting caption amounted to libel. Wong further claims that the company's inclusion of a link to his Flickr profile was not sufficient to satisfy the attribution requirements of the Creative Commons licence under which the photograph had been made available. With regards to Creative Commons, Wong claimed that the organisation owed him a duty as a user and beneficiary of a Creative Commons licence, and that they breached this duty by failing to "adequately educate and warn him...of the meaning of commercial use and the ramifications and effects of entering into a license allowing such use".⁴⁴

Not long after the furore erupted, Virgin removed from their website most of the photographs in which particular people could be identified and replaced them with related but less controversial images. For example, one ad using the line 'People who talk in lifts have bad breath' which originally pictured a group of people talking in a lift⁴⁵ was replaced with a picture of an overflowing ashtray. This seems an appropriate response, especially considering the following disgruntled blog post by the subject of the 'talking in the lift' photograph, computer book author Molly Holzschlag:

There's a level of irony in this particular picture...The person I'm talking with is the head of Web Development for Yahoo! Europe – and Yahoo! is of course Flickr's big daddy. Virgin really stepped in it but (sic) good".⁴⁶

Virgin also appears to have since taken down all the billboard advertisements, although this may merely have been due to the campaign coming to an end.

As a final footnote, since the initial filing of the legal papers, Virgin Mobile USA has been removed as a respondent to the case, on the basis that they are an entirely separate company to Virgin Mobile Australia and were in no way involved in the campaign.⁴⁷ In late November 2007, Creative Commons was also dropped as a defendant.⁴⁸ Although no

⁴³ Chang, *supra* note 3.

⁴⁴ *Ibid.*

⁴⁵ See Daniel Morrison, "Molly holds court in the elevator" (12 March 2007), online: Flickr <<http://www.flickr.com/photos/danielmorrison/419368629/>>.

⁴⁶ *Supra* note 34.

⁴⁷ Andrew D. Smith, "Bedford Mom Sues Virgin Mobile Over Teen's Photo in Ad" *The Dallas Morning News* (21 September 2007), online: Dallas News <http://www.dallasnews.com/sharedcontent/dws/bus/stories/DN-suevirgin_21bus.ART.State.Edition1.35bdb09.html>.

⁴⁸ Lawrence Lessig, "From the Why-a-GC-from-Cravath-is-great Department: The Lawsuit is Over" (28 November 2007), online: Lessig 2.0 <http://lessig.org/blog/2007/11/from_the_whyagcfromcravathisgr.html> [Lessig, "The Lawsuit is Over"].

reason was provided, the general consensus seems to be that Creative Commons was removed due to a lack of a legal cause against them.⁴⁹

IV. LEGAL ANALYSIS

A Compliance with the Creative Commons Licence

Unlike the *Curry v. Audax*⁵⁰ and *El Pais* cases discussed above, Virgin Mobile's use does not immediately appear to be an obvious breach of the Creative Commons licences used for the photographs included in the campaign. With the possible exception of one photograph, the licence of which may have been altered after the campaign, all the images were made available under the Creative Commons Attribution licence, which clearly allows the kind of commercial use and alterations undertaken by Virgin.⁵¹ Indeed, Virgin Mobile appears to have chosen the photographs on this basis, as one Flickr member has indicated that he was contacted by an advertising agency to obtain his permission to use an 'all rights reserved' image in the campaign, only to later receive an apology that "The client went for a different shot".⁵²

Nevertheless, there is still some question as to whether Virgin did in fact comply with all the Creative Commons licence conditions. As the legal claim filed by Wong and the Changs points out, it appears unlikely that Virgin's attribution satisfies the Creative Commons licence requirements. The licence deed (i.e. plain English summary) of the Creative Commons licences specifically states that the licence requires attribution 'in the manner specified by the author or licensor'. By reading the full licence Virgin would have been made aware that the required attribution should include:

- (i) the name of the author (or pseudonym, if applicable), and/or the name of any other party designated by the licensor;
- (ii) the title of the work; and
- (iii) to the extent reasonably practicable, any uniform resource identifier (e.g. link) associated with the Work that refers to the copyright notice or licensing information for the Work.⁵³

The licensee is also required to provide a link to the appropriate Creative Commons licence with every copy of the work they distribute.⁵⁴ Yet both the billboard and web versions of the advertisements merely included a link to the home page of the photographer's Flickr account in the bottom corner. Virgin did not directly name the

⁴⁹ *Ibid.*

⁵⁰ *Curry*, *supra* note 10.

⁵¹ *Supra* note 23.

⁵² Steve Rhodes's comment, "Virgin Mobile advertising campaign using Flickr photos" (28 June 2007), online: <<http://www.flickr.com/groups/central/discuss/72157600541608353/72157601393029582/>>.

⁵³ Creative Commons Attribution licence cl.4(b), online: Creative Commons <<http://creativecommons.org/licenses/by/3.0/legalcode>>.

⁵⁴ Creative Commons Attribution licence cl.4(a), online: Creative Commons <<http://creativecommons.org/licenses/by/3.0/legalcode>>.

photographers, reference or link to the Creative Commons licence the photo was under, or link to the image itself.

Although the licence allows users to vary the images when it is 'reasonable', it is questionable whether Virgin had reason not to give greater attribution in this case. Following the logic in the *Curry* case, as a large corporation there is a strong onus on Virgin to fully read the licence of any material they use. If only from a risk management point of view, it would be shrewd for the company to implement best practices for a national ad campaign. Even a link to the Flickr page of the photograph itself would have come closer to complying with the licence requirements, as it would at least have provided the means for the viewer to seek for themselves the attribution information provided on the page. As it is, with many Flickr photographers having hundreds or even thousands of photographs posted to their profile, it would be virtually impossible for any person seeking to use the particular photograph to identify it, its title or the licence it was under. The Creative Commons attribution requirements as they currently exist act not only to recognise the moral rights of the author, but also to ensure others are notified of the existence of the licence and given the opportunity to locate and use the photograph themselves should they so wish. By merely linking to the photographer's profile, Virgin has in effect undermined the 'openness' of the photographs.

It should be noted that, were the case being heard in an Australian court, the question of the validity of Virgin Mobile's attribution could also give rise to a cause of action for breach of the moral rights of the photographers. Accurate attribution is one of three moral rights recognised by Australian copyright law.⁵⁵ These rights are personal to the author and cannot be waived or assigned by contract. As such, even if the attribution can be said to satisfy the requirements of the Creative Commons licence, it is still possible that it does not satisfy this legislative right. Furthermore, by adding insulting captions, there is also a possibility that Virgin Mobile has breached the photographers' moral right of integrity, which prohibits material distortions of, or a material alteration to, artistic works that are "prejudicial to the author's honour or reputation".⁵⁶ It should be noted that moral rights law is still in its fledgling stages in Australia, with the first case to award a moral rights infringement only decided in December 2006.⁵⁷ As such, the elements of the rights are yet to be defined, and it is difficult to determine the chances of success of any suit on such grounds. Nevertheless, the fact that the insulting captions applied by Virgin Mobile are aimed at the subjects of the photo, rather than the photographer or photograph, makes a cause of action based on the right of integrity unlikely.

B Personal Rights

As libel and privacy causes of action raised in the legal filings fall outside the scope of the Creative Commons-licences on which this paper focuses, the authors do not intend to provide substantive legal analysis as to the likelihood of their success. Nevertheless, it is interesting to note that, were Australian law to be applied, it is questionable whether the

⁵⁵ *Copyright Act 1968* (Cth.), ss. 189-195AZR.

⁵⁶ *Ibid.* at s195AK(a).

⁵⁷ *Meskenas v. ACP Publishing Pty Ltd.*, [2006] FMCA 1136.

causes would succeed. Although Australia has steadily developed its privacy rights, there currently exists no distinct right of publicity to the same extent as the US.⁵⁸ Rather, defamation, passing off law, trademark laws or the *Trade Practices Act 1974* (Cth.)⁵⁹ have been used to achieve similar decisions as those in publicity rights cases in the US.⁶⁰ While defamation could potentially be raised as a remedy if publication of the photograph impaired the reputation of the subject, proof would be required that Alison had a public reputation that had been lowered, exposing her to hatred, contempt or ridicule, or causing her to be shunned or avoided.⁶¹ It seems unlikely that such an argument would succeed. While Alison and her family were clearly offended at the 'dump your pen friend' caption over her image,⁶² public discussion shows that interpretation of the caption's meaning is subjective, with many of those who viewed the ad publicly stating that they did not believe it had ridiculed or insulted Alison.⁶³

However, closely related to the issues of libel and privacy is the question of model clearances. Much of the public discussion of the case has focused on the question as to whether Virgin should have obtained permission from the people who are identifiable in the photographs. The Flickr forums in particular contain numerous posts debating the issue, with statements both in favour of⁶⁴ and against⁶⁵ the use of model clearances. Even a person claiming to be Flickr's general manager waded into the debate, stating "in the US, Canada, the EU (and presumably Australia and most of the rest of the world) use of a recognizable person in a commercial context (here "commercial" generally means in advertising or promotions) definitely requires a model release."⁶⁶

However, there is a real question as to whether this is true. Although it seems to be industry practice to obtain a model clearance where a photograph is being used for commercial purposes,⁶⁷ it is questionable whether this is a legal requirement under

⁵⁸ An Australian Law Reform Commission review was initiated in 2006 to bring Australian privacy laws further in line with modern developments; however, its recommendations are yet to be handed down - Austl., Commonwealth, Australian Law Reform Commission, *Review of Australian Privacy Law*, (Discussion Paper No. 72) (Canberra: Australian Government Publishing Service, 2007).

⁵⁹ *Trade Practices Act 1974* (Cth.) [*Trade Practices Act*].

⁶⁰ See e.g. *Henderson v. Radio Corp Pty Ltd.*, [1960] N.S.W. St. R. 576, (1960), [1969] R.P.C. 218 (S.C.) [*Henderson*]; *Ettinghausen v. Australian Consolidated Press Ltd.* (1991) 23 N.S.W.L.R. 443 (S.C.) [*Ettinghausen*].

⁶¹ Publication alone without permission does not prove defamation. See, e.g. *Ettinghausen*, *supra* note 60.

⁶² Moses, *supra* note 2.

⁶³ *Supra* note 8.

⁶⁴ See e.g. "Virgin Mobile advertising campaign using Flickr photos" (28 June 2007), online: Flickr <<http://www.flickr.com/groups/central/discuss/72157600541608353/72157600542126986/>>.

⁶⁵ See e.g. "Virgin Mobile advertising campaign using Flickr photos" (28 June 2007), online: Flickr <<http://www.flickr.com/groups/central/discuss/72157600541608353/72157600960543755/>>.

⁶⁶ Stewart's comment, "Virgin Mobile advertising campaign using Flickr photos" (28 June 2007), online: Flickr <<http://www.flickr.com/groups/central/discuss/72157600541608353/#comment72157600545426189>>.

⁶⁷ See e.g. "Model Release Primer", online: Dan Heller Photography <<http://www.danheller.com/model-release-primer.html>>; and Andrew Nemeth, "Australian Street Photography Legal Issues" (10 May 2008), online: 4020 <<http://www.4020.net/words/photorigths.php>>.

Australian law, in the circumstances of this case. Section 53 of the *Trade Practices Act*⁶⁸ does prohibit commercial conduct that misleads or deceives consumers into thinking a particular person has purchased or is affiliated with a product. However, existing cases in this area tend to involve a person who is a celebrity or at least well known to the public, and be limited to circumstances where it is clear that consumers were falsely led to believe that person was endorsing the product.⁶⁹ The Virgin ads, with their deliberate 'amateur' style and sarcastic by-lines, can hardly be said to clearly imply endorsement – if anything, they make it clear that the person is an unwitting participant in the joke.

The failure to obtain model clearances may hold more clout in the US, where the right to control how one's persona is commercialised by third parties is more readily recognised. Yet, while Alison's counsel assert that Texas law requires that "if a company uses your face in its ads without your consent, then you're entitled to whatever money those ads generate for the company",⁷⁰ it is not clear that this is the case under US law. As with Australian law, judicial consideration of the right of publicity in US courts has focused more on celebrities than members of the general public.⁷¹

Regardless of the legal situation, from a best practice standpoint it would have been advisable for Virgin Mobile to seek clearances from the individuals involved in such a widespread advertising campaign, whether celebrity or otherwise. Public sentiment certainly appears to condemn Virgin's failure to obtain a model clearance, and doing so would have been likely to avoid the legal action. It certainly seems unlikely that any lawyer would advise a company like Virgin to launch such an ad campaign without first contacting the photographers – if only to avoid the kind of public backlash that has occurred.

V. AFTERMATH OF THE VIRGIN CASE

Although the outcome of the legal action commenced by Wong and the Changs is yet to be seen, it has already had a substantial effect on the Creative Commons and Flickr communities. The public debate surrounding the Virgin Mobile case has raised a number of issues about Creative Commons ethics and practice which are likely to have an effect on the development of the licences and their take up in the wider community. These are discussed further below.

A Free Culture or Free Ride?

One of the common themes running through the *Virgin Mobile*, *Curry* and *El País* cases is a lack of understanding as to exactly what uses the Creative Commons Noncommercial licences permit. Despite the fact that in each of the cases there seems to be little doubt as

⁶⁸ *Supra* note 59 at s.53, online: AustLII
<http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s53.html>.

⁶⁹ See also *Talmax Pty. Ltd. v. Telstra Corp. Ltd.*, [1996] QSC 34; *Pacific Dunlop Ltd. v. Hogan* (1989), 23 F.C.R. 553 (F.C.A.); *Honey v. Australian Airlines Ltd.* (1990), 18 I.P.R. 185 (F.C.A.).

⁷⁰ *Supra* note 47.

⁷¹ See e.g. *Henderson*, *supra* note 60.

to the commercial nature of the use of the photographs, all three circumstances raise the question as to whether the element of 'commercial use' has been properly explained and delineated. It is clear from a legal perspective that the claim of negligence against Creative Commons for failing to adequately explain its licences was weak at best. The Creative Commons website provides substantial explanatory materials regarding the details of its licences, which are linked to the Flickr licensing page. If anything, Creative Commons provides more information about the details of their licences than your average attorney, not to mention the vast majority of licences used by online entities. Nevertheless, the case provides evidence that there is still room for additional steps by Creative Commons to educate users about the implications of their licensing decisions.

The 'non-commercial' term is the most popular of the Creative Commons licence elements, and is applied to 67.5 percent of all Creative Commons works.⁷² However, it is also the most controversial of the Creative Commons licence elements. It has been described as "vague",⁷³ "dangerously ill-defined"⁷⁴ and "confusing",⁷⁵ and its value has been debated by many of Creative Commons' most well-known advocates and critics⁷⁶. The Creative Commons organisation recognises this, and has launched a number of public initiatives aimed at clarifying and educating users more about the meaning of non-commercial in the Creative Commons licences. In late 2006 it launched a set of proposed non-commercial guidelines for comment by the Creative Commons community. Although still in draft form, these guidelines aim to assist with determining whether a particular use is non-commercial, based on a series of standardised questions about the use.⁷⁷ Creative Commons has also announced that during 2008 they will be undertaking a study of the non-commercial term which could result in changes to the licences and/or additional explanatory material on the website.⁷⁸

⁷² "Distribution of license properties across licenses deployed" (2006), online: Creative Commons <http://wiki.creativecommons.org/License_statistics>.

⁷³ Nick Sweeney, "Introducing Creative Commons" (March 2006), online: Arts Law Centre of Australia Online <<http://www.artslaw.com.au/LegalInformation/IntroducingCreativeCommons.asp>>; Gordon Haff, "Why and How to Fix Creative Commons" (15 January 2008), online: CNET Blogs <http://www.cnet.com/8301-13556_1-9849881-61.html>; Erik Möller, "The Case for Free Use: Reasons Not to Use a Creative Commons -NC License" (2005-2007), online: Freedom Defined <<http://freedomdefined.org/Licenses/NC>>.

⁷⁴ Gordon Haff, "Does the Noncommercial Creative Commons license make sense?" (27 November 2007), online: CNET Blogs <http://www.cnet.com/8301-13556_1-9823336-61.html>.

⁷⁵ Joan McGivern, "10 Things Every Music Creator Should Know About Creative Commons Licensing" (2007), online: The American Society of Composers, Authors and Publishers <http://ascap.com/playback/2007/fall/features/creative_commons_licensing.aspx>.

⁷⁶ mako [Benjamin Mako-Hill], "Towards a Standard of Freedom: Creative Commons and the Free Software Movement" (29 July 2005), online: Advogato <<http://www.advogato.org/article/851.html>>; Lawrence Lessig, "CC in Review: Lawrence Lessig on Important Freedoms" (7 December 2005), online: Creative Commons <<http://creativecommons.org/weblog/entry/5719>>; See Klauss Graff comment-, Lawrence Lessig, "On the Texas Suit Against Virgin and Creative Commons" (22 September 2007), online: Lessig 2.0 http://lessig.org/blog/2007/09/on_the_texas_suit_against_virg.html [Lessig, "On the Texas Suit"].

⁷⁷ Mia Garlick, "Discussion Draft – NonCommercial Guidelines" (10 January 2006), online: Creative Commons <<http://creativecommons.org/weblog/entry/5752>>.

⁷⁸ "Proposed Best Practice Guidelines to Clarify the Meaning of "Noncommercial" in the Creative Commons Licenses" (1 December 2007), online: Creative Commons <http://wiki.creativecommons.org/DiscussionDraftNonCommercial_Guidelines>.

Nevertheless, the cases discussed can hardly be attributed to confusion over the meaning of non-commercial. In each of their circumstances, the nature of the use was clearly commercial, as has been noted on the Flickr discussion boards.⁷⁹ Instead, Audax's, El País's and even Virgin Mobile's infringements seem to be based either on failure to read the licences or misunderstanding of standard copyright law. The response from the newspaper spokesperson in the *El País* case in particular demonstrates how many users are still of the opinion that, at least ethically if not legally, material on the Internet is a free for all. Creative Commons's ability to address the issue may therefore be limited.

B Creative Commons Licence and Model Clearance Compatibility

Some commentators have suggested that the failure to deal with the issue of model clearances represents a flaw in the Creative Commons licences.⁸⁰ The argument goes that, as the licences purport to provide permission to use the photographs commercially, they should cover all rights required to do so, including model clearances. Other commentators have suggested that the responsibility is on the photographers, and that licences that allow commercial use should not be applied to photographs in which individuals are identifiable unless such clearances have been obtained.⁸¹

However, the Creative Commons licences make it very clear that they merely provide copyright permissions, and that they do not purport to deal with any other area of law. Indeed, they have an extensive disclaimer clause which specifically states that they provide no warranty, express or implied, as to merchantability, marketability or fitness of purpose.⁸² Due to the vast number of uses that can be made of Creative Commons licensed material and the multitude of legal jurisdictions in which such uses can occur, the laws that can come into play (e.g. defamation, privacy, competition, to name but a few) is significant. It would be impossible for the licences, or the person issuing the licence for that matter, to definitively cover all potential legal issues which may arise in releasing the work for general use. There is therefore a strong argument that, if only for practical reasons, the onus must be on the person or company making use of the work to identify any laws their particular actions might breach, and to make an effort to obtain any additional permissions that are needed. By using a Creative Commons licence they are obtaining a copyright clearance; however they themselves must make the effort to seek any additional permissions or clearances that might arise from other relevant areas of law. Such precautionary steps would seem particularly important if their use is large-scale and commercial, and even more so if the image is that of a minor, as in Alison's case.

Although the principle legal onus is on the user of the photograph, any person Creative

⁷⁹ See "Virgin Mobile advertising campaign using Flickr photos" (28 June 2007), online: Flickr <<http://www.flickr.com/groups/central/discuss/72157600541608353/72157600972448807/>>.

⁸⁰ Shelley Powers, "Virgin Bites Creative Commons on the Butt" (10 July 2007), online: Burningbird <<http://burningbird.net/connecting/virgin-bites-creative-commons-on-the-butt/>>.

⁸¹ See e.g. "Virgin Mobile advertising campaign using Flickr photos" (28 June 2007), online: Flickr <<http://www.flickr.com/groups/central/discuss/72157600541608353/72157600610121981/>>.

⁸² Creative Commons Attribution 3.0 United States License Cl.5, online: Creative Commons <<http://creativecommons.org/licenses/by/3.0/us/legalcode>>.

Commons licensing their work without obtaining model clearances does potentially expose themselves to some risk if their content is reused or published commercially in jurisdictions such as the US. Creative Commons Chairman Joichi Ito acknowledged this when he relayed to an audience at the 2007 iSummit the importance of understanding the legal aspects of publishing an individual's photograph. While he admitted to not obtaining model clearances for any of his photos published under a Creative Commons-Attribution licence, he does make a point of not publishing any unflattering images of people. He further emphasised the importance of ensuring licence users understand the risks they are taking by not obtaining clearances.⁸³

Although the Creative Commons founder, Stanford law Professor Lawrence Lessig, has been careful to note that Creative Commons should not provide "what looks like legal advice",⁸⁴ several recent actions by Creative Commons suggest it may prove itself receptive to addressing the obstacle that the lack of availability of model release forms presents to the up take of the Creative Commons licences.⁸⁵ Even prior to the Virgin Mobile case Creative Commons had added additional information to its Frequently Asked Questions page dealing with the issue of publicity rights, which links to a detailed section in its podcasting guide.⁸⁶ Other suggestions put forward include Creative Commons offering a model clearance rights tutorial such as that found on *istockphoto.com*⁸⁷ or even altering the licence deed to acknowledge additional rights that may not be cleared.⁸⁸ A project devised by Joichi Ito called "Freesouls", which aims to provide high-quality Creative Commons-Attribution licensed images of interesting people and offer them for reuse as simplistically as possible, seems likely to go even further towards addressing the issue of privacy rights and Creative Commons.⁸⁹ Such steps would seem to be particularly important if Creative Commons wish to extend their user-base to those in the professional and institutional arena, or to encourage the use of Creative Commons content in commercial settings without the legal complications brought about by the Virgin Mobile advertising campaign.

The Virgin Mobile case has certainly raised public awareness of this issue. Wikimedia, an online community that licences their material in a similar manner to Creative Commons, has added the following notice to their *Wikimedia Commons* webpage, which provides information on reusing content outside of Wikimedia:

Warning on images of people: Even if a given image is pre-cleared with regard

⁸³ See, David Harris, "CC Not in a Theater Near You w/o Model Releases" (25 June 2007), online: iCommons <http://www.icommons.org/articles/cc-not-in-a-theater-near-you-wo-model-releases> [Harris].

⁸⁴ Cohen, *supra* note 2.

⁸⁵ Harris, *Supra* note 83.

⁸⁶ See "Frequently Asked Questions" (14 February 2008), online: Creative Commons <http://wiki.creativecommons.org/FAQ#When_are_publicity_rights_relevant.3F>; and David Gerard's comment on Lessig, "On the Texas Suit", *supra* note 76.

⁸⁷ See Henri Laupmaa's comment, Lessig, "On the Texas Suit", *supra* note 76; and Harris, *supra* note 83.

⁸⁸ Gavin Baker, "Let's all sue Creative Commons: a defense, and suggestions for publicity et al." (22 September 2007), online: A Journal of Insignificant Inquiries <<http://www.gavinbaker.com/2007/09/22/lets-all-sue-creative-commons>>.

⁸⁹ Lessig, "On the Texas Suit", *supra* note 76.

to copyright, this does not mean the image is pre-cleared with regards to possible personality rights, moral rights or model releases, depending on jurisdiction. Take care with context when reusing images of people.⁹⁰

Indeed, even Flickr has responded to the incident, and now reportedly provides the following message to photographers who have made high resolution images available under Creative Commons licences that allow commercial use:

Any user can download this photo because you've applied a Creative Commons license to it. Change license?⁹¹

C Ethics and the Creative Commons

What the public reaction to the Virgin Mobile incident has perhaps most emphasised is the ongoing difference of opinion as to the ethics of, and motivations for, Creative Commons usage. From a technical legal standpoint, if the photographs that Virgin Mobile used were licensed to allow commercial use and the company had complied with any other licence restrictions (i.e. Attribution, No Derivatives, ShareAlike), then this kind of use appears to be permitted under the Creative Commons model. But even if they had no legal duty to do so, should Virgin Mobile have used photographs that had been provided online as part of a sharing culture in such a widespread commercial campaign, rather than seeking out similar photographs through professional avenues? More notably, should they at least have notified the photographers that they were planning on using their photos?

Public opinion in the Flickr forums certainly seems to be that they should have. To quote gillicious, one of the photographers whose image was used in the campaign:

How much trouble would it have been for a Virgin representative to create a user [profile] on flickr [sic] to comment on each photo being used, just to inform us that it was? Just to be polite! They're a huge company, they could afford to hire a lackey to do it.⁹²

On the other hand, there is also an argument that this is exactly why Creative Commons includes the non-commercial term as an optional element of their licences - so that people can choose to share their material even with large corporations if they wish to. As Flickr user Alan Bruce puts it:

“The thing about the Creative Commons Attribution-Only license is that you are

⁹⁰ “Commons: Reusing content outside Wikimedia”, online: Wikimedia Commons <http://commons.wikimedia.org/wiki/Commons:Reusing_content_outside_Wikimedia>, at 7 January 2008. Wikimedia uses GFDL rather than Creative Commons licensing – however the principles are not dissimilar.

⁹¹ Qole Pejorian [Alan Bruce]’s comment, “Virgin Mobile advertising campaign using Flickr photos” (28 June 2007), online: Flickr <<http://www.flickr.com/groups/central/discuss/72157600541608353/72157601662536021/>>.

⁹² gillicious’ comment, “Virgin Mobile advertising campaign using Flickr photos” (28 June 2007), online: Flickr <<http://www.flickr.com/groups/central/discuss/72157600541608353/72157600669104564/>>.

telling other people, "go ahead, use this picture as you wish, just credit me," without any requirement to tell the photographer or even be "nice" with the photo. So I guess this license isn't for the faint of heart...On the other hand, if you sell your photo to a stock photo bank, the same things apply... people who buy your photo can use it however they like. But I would prefer fame instead of money, and this license certainly has gotten me a bit of fame!"⁹³

D *The Importance of Education*

One thing noted by several Flickr users is that the Virgin Mobile case clearly demonstrates the importance of both creators and users understanding the Creative Commons licences before they use them.⁹⁴ Wong's anger at Virgin Mobile's use of his material would appear to indicate that he did not fully comprehend the implications of the licence when he chose to apply it to his work. Despite the weakness the legal claim of negligence against them, Creative Commons has taken the matter seriously, with Professor Lawrence Lessig publicly apologising for any trouble that confusion about the Creative Commons licences might have created and undertaking to work harder to make the licences as clear as possible.⁹⁵

These cases also clearly demonstrate the need for a better understanding of copyright in general. It can be hoped that the existence of the Creative Commons licences may assist to educate both creators and users about their rights and responsibilities with respect to copyright law, and even to help combat copyright piracy online. With 'all rights reserved' copyright restrictions so often ignored even by large scale commercial entities, a licence on content such as that offered by Creative Commons works to draw attention to the existence of legal rights over the material which must be considered and obeyed. And in the event that their rights are infringed, it at least gives the copyright owner a written document to point towards that sets out the exact terms of use permitted, without needing to resort to the more obtuse provisions of copyright law. It can be hoped that third party users of internet content acting innocently or in good faith will be more likely to adhere to copyright restrictions if they have clear instructions from the owner as to how the work can (or cannot) be reused. As Alan Bruce puts it:

Ironically, I find the [attribution only] license to be more of a deterrent to theft than marking the photo "All rights reserved." For some reason, people think it's "cheap" to attribute the photo. It's actually stealing attention away from your ad and focusing some of it on the photographer. Which is great for the photographer!⁹⁶

⁹³ *Supra* note 28.

⁹⁴ See, for example, the following comment by Flickr member ellipse: "yeah i mean seriously people there was a license, they used it why are they the bad party? to me the issue is people not understanding licenses when they apply them", online: Flickr <<http://www.flickr.com/groups/central/discuss/72157600541608353/72157600961016540/>>.

⁹⁵ Lessig, "The Lawsuit is Over", *supra* note 48; See similarly Lessig, "On the Texas Suit", *supra* note 76.

⁹⁶ *Supra* note 24.

VI. CONCLUSION

The Virgin Mobile case is currently in the discovery stage, and a suspenseful stay now awaits to see if it makes it to an outcome.⁹⁷ As the case requires a far more subtle analysis than either the *Curry* or *El País* cases, it has the potential to clarify a number of hitherto untouched legal issues relating to the use of Creative Commons licences. However, even without a legal decision, the public debate inspired by the case has already served a valuable purpose in the continuing evolution of the Creative Commons movement. It has highlighted the ongoing disparity in views as to what constitutes an ethical use of open-content material, and the potential for public backlash if these ethics are not obeyed. It is likely that Virgin Mobile will have learnt its lesson from the experience, and that the case will herald a new awareness of best practice standards, particularly in circumstances involving the use of Creative Commons licensed material by commercial entities. But as long as the El Pais Newspapers of the world continue to flout copyright, the potential for contention remains. Perhaps what this case then most highlights is the ongoing debates regarding practical application that are always likely to surround any project that aims to provide standardised legal tools to a large number of users, each with their own motivations, interpretations and understandings. As such, clarification and education tactics are likely to be an ongoing requirement for Creative Commons in their quest to develop and promote free culture.

⁹⁷ *Chang, supra* note 3.

